

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 18**

**MILWAUKEE ART MUSEUM, INC.**

**Employer**

**and**

**DISTRICT LODGE 10, INTERNATIONAL  
ASSOCIATION OF MACHINISTS &  
AEROSPACE WORKERS, AFL-CIO**

**Petitioner**

**Case 18-RC-265466**

**DECISION AND DIRECTION OF ELECTION**

For many years, via voluntary recognition by the Employer, Petitioner has represented a unit of security guards employed by the Employer. Petitioner seeks herein to represent a unit of professional and non-professional employees employed by the Employer, excluding all other employees including office clerical employees, temporary employees, confidential employees, guards and supervisors.<sup>1</sup> Petitioner is not seeking to combine the represented guards into the petitioned-for non-guard unit. Additionally, Petitioner seeks a mail ballot election in light of the current constraints of the COVID-19 pandemic.

The Employer contends that under Section 9(b)(3) of the Act, Petitioner should be barred from seeking to represent the petitioned-for non-guard employees based on its current representation of the guard unit. In this regard, the Employer asserts that controlling Board cases in favor of permitting the petition to proceed were wrongly decided and fail to meaningfully

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<sup>1</sup> There are approximately two dual function employees employed as a receiving supervisor and an adult docent school programs administrator whom the Employer claims spend time performing office clerical work and should be excluded from the unit on the basis that they do not share a sufficient community of interest with the other petitioned-for employees. At the hearing, I determined that the status of these dual function employees would not be addressed in the hearing and, rather, that these employees may vote subject to challenge in any election ordered herein. I reaffirm my ruling in this regard.

consider and apply the Section 9(b)(3) interpretative principles specifically set forth in *Loomis Armored US, Inc.*, 364 NLRB No. 23 (2016) and *Wells Fargo Armored Service Corporation*, 270 NLRB 787 (1985). The Employer also contends that a manual election is appropriate and that it is possible to conduct a manual election safely notwithstanding the issues related to the COVID-19 pandemic.

A hearing officer of the Board held a video hearing in this matter. Although election details, including the type of election to be held, are nonlitigable matters left to my discretion,<sup>2</sup> the parties were permitted to present their positions as to the mechanics of this election at the hearing and by brief. I have carefully considered those positions and arguments. As explained below, based on the record<sup>3</sup> and relevant Board cases, I conclude that Section 9(b)(3) does not preclude the Board from certifying a unit comprised solely of non-guard employees and, therefore, there is no basis on which to find a bar to Petitioner's representation of the petitioned-for employees at issue in this case. I also find that in view of the circumstances discussed below related to the current state of the COVID-19 pandemic, an election by mail is appropriate.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Based on the record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it would effectuate the purposes of the Act to assert jurisdiction herein.<sup>4</sup>

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<sup>2</sup> See, *Representation-Case Procedures*, 84 Fed. Reg. 65924, 65944, fn. 82 (2019) (citing *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954)). See also, *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1819 (2011); *Halliburton Services*, 265 NLRB 1154, 1154 (1982).

<sup>3</sup> The Employer filed a brief which I have duly considered. Petitioner waived its right to file a brief.

<sup>4</sup> The parties stipulated that the Employer, a Wisconsin corporation with facilities located in Milwaukee, Wisconsin, is engaged in the operation of a museum that collects, preserves and presents art to the community. During the 12-month period ending September 22, 2020, a representative period, the Employer derived gross revenues in excess of one million dollars. During the same period of time, the Employer purchased and received at its Milwaukee, Wisconsin facilities, goods valued in excess of \$50,000 directly from points outside the State of Wisconsin.

3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. There is no collective-bargaining agreement in effect covering any of the individuals in the petitioned-for unit and, therefore, no contract exists barring consideration of the instant petition.
6. The parties have stipulated that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

**Included:** All full-time and regular part-time professional and non-professional employees employed by the Employer at its Milwaukee, Wisconsin facilities.

**Excluded:** All other employees, office clerical employees, temporary employees, confidential employees, guards and supervisors as defined by the Act, as amended.

## **FACTS**

### **A. The Employer's Operations and Bargaining History**

The Employer operates a museum that collects, preserves and presents art to the city of Milwaukee and its surrounding communities. For many years, via voluntary recognition by the Employer, Petitioner has represented a unit of security guards employed by the Employer at the Milwaukee County War Memorial Center.<sup>5</sup> The record is silent regarding the approximate number of guards in the existing bargaining unit. The parties' most recent collective bargaining agreement is effective from September 1, 2020 to August 31, 2023.

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<sup>5</sup> According to the Employer's website, which I take administrative notice of, its 341,000-square-foot museum located at 700 N. Art Museum Drive includes three buildings: the War Memorial Center, built in 1957, the Kahler Building, built in 1975, and the Quadracci Pavilion, built in 2001. Except for the recognition clause in the parties' collective bargaining agreement, which provides that the Employer recognizes Petitioner as the exclusive bargaining representative of all regular full-time and all regular part-time security guards employed by the Employer at the Milwaukee County War Memorial Center, Inc., the record is silent as to the exact work location(s) of the security guards.

Petitioner seeks to represent approximately 125 to 142<sup>6</sup> professional and non-professional employees at its Milwaukee facilities.<sup>7</sup> While the parties stipulated there are 45 professional job classifications in the unit, the record is silent as to the breakdown of the number of professional employees and non-professional employees.

## **ANALYSIS – APPROPRIATE UNIT**

### **A. The Applicable Legal Standard**

Under Section 9(b)(3) of the Act, a unit is not appropriate “if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises...”. Section 9(b)(3) also states that “no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.” Simply stated, Section 9(b)(3) of the Act precludes the Board from either including guards and non-guards in the same unit or certifying a union which represents non-guards as the bargaining agent for a unit of guards.

Although the Act specifically precludes certifying a union which represents non-guards as the bargaining agent for a unit of guards, the Board has found that the Act does not, on the other hand, bar the converse<sup>8</sup> and has long held that “the Act does not prohibit the Board from

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<sup>6</sup> Petitioner asserts the approximate number of employees in the petitioned-for unit is 142, while the Employer asserts it is 125.

<sup>7</sup> The parties’ stipulation (Board Exhibit 2) references its Milwaukee facilities as being located at 700 N. Art Museum Drive and 626 E. Wisconsin Avenue. As noted, 700 N. Art Museum Drive is the address of the main museum campus. According to a November 2015 article from the Milwaukee Business Journal, the 626 E. Wisconsin Avenue facility underwent construction by the Employer to house some of its office staff starting in about early 2016. See, [https://www.bizjournals.com/milwaukee/blog/real\\_estate/2015/11/milwaukee-art-museum-to-locate-offices-in-upper.html](https://www.bizjournals.com/milwaukee/blog/real_estate/2015/11/milwaukee-art-museum-to-locate-offices-in-upper.html). The record is silent as to the specific employees that work at that facility.

<sup>8</sup> See *E.R. Squibb & Sons*, 77 NLRB 84, 85 (1948).

certifying a labor organization which itself represents guards as the representative of employees other than guards.” *Dynair Services, Inc.*, 314 NLRB 161, 161 (1994), citing *Pinkerton’s National Detective Agency, Inc.*, 90 NLRB 532, 533 (1950), citing *E.R. Squibb & Sons*, 77 NLRB at 84-85. In *Pinkerton’s*, the Board decided that nothing in the Act precluded the certification of a labor organization which represents guards as the representative for employees other than guards. *Ibid.* This holding was subsequently applied in *Dynair*, where the guards and non-guards both worked at the same location, the Port of Seattle. *Ibid.*

## **B. Application of Legal Standard**

Petitioner concedes that if, conversely, it currently represented non-guards and was attempting to petition for a unit of guards, certification would not be appropriate under Section 9(b)(3).<sup>9</sup> Such is not the case. Here, the Employer agrees that the unit sought by Petitioner is appropriate for the purposes of collective bargaining and acknowledges that Petitioner is not seeking to combine the existing represented guards into the petitioned-for unit. Accordingly, neither of the Section 9(b)(3) prohibitions concerning units that include guards are implicated in this case. Nevertheless, the Employer argues that allowing certification of the proposed non-guard unit would be contrary to the spirit of Section 9(b)(3) and that long-recognized policy

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<sup>9</sup> The Employer argues that Petitioner waived its right to make any arguments regarding Section 9(b)(3)’s unit limitations because it failed to introduce actual evidence at the hearing and presented only oral argument via its representative. I reject this argument. NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11811 provides that pre-election representation hearings are investigatory in nature, “intended to make a full record and nonadversarial.” Moreover, per Sec. 11216, in R case hearings, “the rules of evidence prevailing in courts of law and equity are not controlling.” I further reject the two cases cited by the Employer (*Mahaffey v. Ramos*, 588 F.3d. 1142 (7<sup>th</sup> Cir. 2009) and *Wrice v. Bryce*, 2020 WL 5630510 (N.D. Ill. Sept. 21, 2020) to support its argument in this regard as not controlling – both of these cases are criminal cases involving convicted felons appealing for federal habeas corpus relief (in *Mahaffey*) and bringing motions for a new trial and judgment notwithstanding the verdict (in *Wrice*).

reasons as discussed in *Loomis*<sup>10</sup> and *Wells Fargo* provide a rationale for Section 9(b)(3)'s enactment and warrant dismissal of the instant petition. Correctly noting, as stated in *Loomis* and *Wells Fargo*, that the prohibitions contained in Section 9(b)(3) were added to the Act due to concerns over possible conflicts of interest between guards and other employees, the Employer contends that the same potential conflicts of interest are present in cases such as this, where guards and non-guards work at the same facility and are represented by the same union. Based on the possibility of divided loyalties presented by this situation, the Employer maintains that Petitioner should be barred from certification as the representative for the petitioned-for unit of non-guards.

I acknowledge the Board's thorough and thoughtful consideration and analysis in *Loomis* as well as in *Wells Fargo* of the history of Section 9(b)(3) and the policy considerations taken into account at the time Section 9(b)(3) was enacted. Section 9(b)(3) was carefully constructed given such policy considerations, and as such, it should be carefully construed. Section 9(b)(3), read literally, proscribes only the Board's authority to "*certify*" a labor organization as the representative of a *bargaining unit of guards* if it admits to membership employees other than guards. The Board does not prohibit employers, such as the Employer herein, from voluntarily recognizing such labor organizations to represent units of guard employees, or mixed units of guard employees and non-guard employees for that; rather, the proscription runs only to utilizing

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<sup>10</sup> In *Loomis*, the Board found that where an employer of a unit of security guards voluntarily recognizes a "mixed-guard" union (a union that has both guard and non-guard members) as the unit's bargaining representative, the employer may not later, after the parties' collective-bargaining agreement has expired, withdraw recognition without demonstrating that the union has lost its majority support. In making this finding, the Board overruled its previous finding in *Wells Fargo* while continuing to rely on the Board's discussion in *Wells Fargo* regarding Congress' clear "purpose in enacting Section 9(b)(3) ... to shield employers of guards from the potential conflict of loyalties arising from the guard union's representation of nonguard employees or its affiliation with other unions who represent nonguard employees."

the Board's processes in furtherance of obtaining certification in these instances.<sup>11</sup> See, *Brinks, Inc.* 272 NLRB 868, 870 (1985). As the Board pointed out in *Loomis*, Section 9(b)(3)'s prohibition on certifying a mixed guard unit as the representative of a guard unit reflects Congress' "chosen method" for addressing the potential conflict of loyalties when an employer's guards are asked to discharge their duties with respect to nonguard employees represented by the same union. 364 NLRB at slip op. 5. However, this prohibition is not implicated here, as the unit Petitioner seeks certification for is a unit comprised *exclusively of non-guard employees*. Accordingly, since the specific, targeted provisos in Section 9(b)(3) embody Congress' concern and method of addressing the potential conflict of loyalties, I see no reason, as the Employer urges, to expand policy in this case.

The issue of a mixed guard union seeking to represent a separate unit of nonguards when it already represents a unit of guards at the same location is not a matter of first impression. As noted above, the Board has considered the same scenario presented herein and most recently rejected the argument that such a petition must be dismissed under Section 9(b)(3) in *Dynair*, *Ibid.* (nine years after its decision in *Wells Fargo*) relying on longstanding precedent in *Pinkerton's* and *Squibb*. Based on this Board precedent, I find that Petitioner's representation of the security guards does not preclude its petition for certification for the non-guard professional and non-professional employees in the unit involved in this case, whether or not the guards and petitioned-for employees are employed at the same or different locations.

Accordingly, I shall order an election in the unit sought by the Petitioner.

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<sup>11</sup> I note that the Employer had a choice at the time it agreed to voluntarily recognize the guard unit and had it demanded representation by certification versus voluntary recognition it would now be insulated from Petitioner's effort to seek representation of the non-guard employees per Section 9(b)(3).

## **CONDUCTING THE ELECTION MANUALLY OR BY MAIL BALLOT**

### **1. The Parties' Positions**

Petitioner argues that a mail ballot election is appropriate under the COVID-19 pandemic circumstances at this time in Wisconsin and particularly given the high number of new COVID cases in Milwaukee. Petitioner also points out that approximately 100 employees in the petitioned-for unit are currently in furlough status and not currently reporting to work due to the pandemic. Petitioner argues that requiring these furloughed employees to travel to work will cause additional undue burdens on them.

The Employer argues for a manual election. It points out that manual elections are normally favored by the Board and provide the best opportunity to exercise their right to vote. In asserting that a manual election would be safe under the circumstances and pose minimal risks to all individuals present, the Employer proposes holding the election in its large secure area at the museum known as the Northwestern Mutual meeting room. The Employer points out that it has many COVID protocols in place which protect employees as referenced in its "Return To Work Playbook" recently issued to employees returning to work following a multi-month pandemic shutdown of the museum. These protocols include strict cleaning and disinfecting procedures by cleaning staff as well as individual employees at their work stations; social distancing actions including controlling the flow of movement and ingress and egress in all museum areas; provision of personal protection equipment (PPE) including masks, gloves, safety glasses and disinfecting supplies to all employees for mandated use; hand sanitizer stations throughout the museum campus; installation of hospital-grade filtration system to enhance air quality; facility modifications to reduce common touch points; regular temperature checks and screening of employees for COVID-19 symptoms and imposition of preventative quarantines for exposed



employees; and other administrative controls to promote and ensure a safe workplace. The Employer has also provided mandatory training on these protocols to all employees. In addition, the Employer will provide additional safety measures to reduce the risk of COVID-19, including those suggestions and certifications listed in the July 6, 2020<sup>12</sup> General Counsel Memorandum 20-10 entitled “Suggested Manual Election Protocols” (GC 20-10). Finally, the Employer argues that the U.S. mail is not reliable, particularly in the Milwaukee area, suggesting a real risk that mail ballot voters may be disenfranchised.

## **2. Board Law, Agency Directives and Legal Authority**

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board, in turn, has delegated the discretion to determine the arrangements for an election to Regional Directors, including the ability to direct a mail ballot election where appropriate. *Ceva Logistics US*, 367 NLRB 628, 628 (2011) (cases cited therein); *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (citing *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *Halliburton Services*, 265 NLRB 1154, 1154; *National Van Lines*, 120 NLRB 1343, 1346 (1958)). “It is well established that a Regional Director has broad discretion in determining the method by which an election is held, and whatever determination a Regional Director makes should not be overturned unless a clear abuse of discretion is shown.” *Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998) (citing *San Diego Gas* 325 NLRB at 1144 fn. 1; *National Van Lines* 120 NLRB at 1346).

The Board’s longstanding policy is that elections should, as a general rule, be conducted manually; however, a Regional Director may reasonably conclude, based on circumstances

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<sup>12</sup> All dates hereafter are in 2020 unless otherwise noted.

tending to make voting in a manual election difficult, to conduct an election by mail ballot. NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11301.2.<sup>13</sup> This includes a few specific situations addressed by the Board, including where voters are “scattered” over a wide geographic area, “scattered” in time due to employee schedules, in strike situations, or other “extraordinary circumstances.” In exercising discretion in such situations, a Regional Director should also consider the desires of all the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and what constitutes the efficient use of Board resources. *San Diego Gas*, 325 NLRB at 1145. Thus, while there is a clear preference for conducting manual elections in ordinary circumstances, Board law indicates Regional Directors may use discretion to order a mail ballot election under the guidelines in *San Diego Gas*, including extraordinary circumstances, and Regional Directors should tailor the method of conducting an election to “enhance the opportunities of all to vote.” Ibid.

The Board recognized the ongoing COVID-19 pandemic to constitute “extraordinary circumstances” and reaffirmed Regional Directors’ discretion regarding election mechanics in its April 17 “COVID-19 Operational Status Update.”<sup>14</sup> In pertinent part:

Representation petitions and elections are being processed and conducted by the regional offices. Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance.

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<sup>13</sup> I note the provisions of the Casehandling Manual are not Board directives or procedural rules. The Casehandling Manual is issued by the General Counsel, who does not have authority over matters of representation, and is only intended to provide nonbinding guidance to regional personnel in the handling of representation cases. See Representation-Case Procedures, 84 Fed. Reg. 39930, 39937 fn. 43 (2019) (“the General Counsel’s nonbinding Casehandling Manual”); *Patient Care*, 360 NLRB 637, 638 (2014) (citing *Solvent Services*, 313 NLRB 645, 646 (1994); *Superior Industries*, 289 NLRB 834, 837 fn. 13 (1988)); *San Diego Gas*, 325 NLRB at 1145 fn. 5 (and cases cited therein). See also *Sunnyvale Medical Clinic*, 241 NLRB 1156, 1157 fn. 5 (1979).

<sup>14</sup> <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

The Board has continued to affirm the ongoing COVID-19 pandemic to be extraordinary circumstances as contemplated by *San Diego Gas*, above,<sup>15</sup> and its recent Orders<sup>16</sup> explain:

The Board will continue considering whether manual elections should be directed based on the circumstances then prevailing in the Region charged with conducting the election, including the applicability to such a determination of the suggested protocols set forth in GC Memorandum 20-10.<sup>17</sup>

As the Board's Orders instruct, I analyze the instant petition using the prevailing circumstances in the Region.<sup>18</sup>

### **3. A Mail Ballot Election Is Appropriate**

The Employer acknowledges “that the current pandemic is certainly unprecedented in modern times...[and] whether it constitutes ‘extraordinary circumstances’ must rise and fall on all relevant circumstances of each petition.” I agree. COVID-19 has created a public health

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<sup>15</sup> See, for example, *Atlas Pacific Engineering Co.*, 27-RC-258742 (unpublished May 8, 2020) (relying on “the extraordinary federal, state, and local government directives that have limited nonessential travel, required the closure of nonessential businesses, and resulted in a determination that the regional office charged with conducting this election should remain on mandatory telework” to deny review of Regional Director’s decision to order a mail ballot election).

<sup>16</sup> See *Savage Services Corporation*, 21-RD-264617 (unpublished October 1, 2020) (denying review of Regional Director’s decision to order a mail ballot election); *Jersey Shore University Medical Center*, 22-RC-263932 (unpublished October 1, 2020) (same); *Sea World of Florida, LLC*, 12-RC-257917 (unpublished September 22, 2020) (same); *Rising Ground*, 02-RC-264192 (unpublished September 8, 2020) (same); *TredRoc Tire Services*, 13-RC-263043 (unpublished August 19, 2020) (same); *Daylight Transport, LLC*, 31-RC-262633 (unpublished August 19, 2020) (same); *PACE Southeast Michigan*, 07-RC-257047 and 07-RC-257046 (unpublished August 7, 2020) (same); *Sunsteel, LLC*, 19-RC-261739 (unpublished August 4, 2020) (same); *Brink’s Global Services USA, Inc.*, 29-RC-260969 (unpublished July 14, 2020) (same).

<sup>17</sup> On July 6, General Counsel Peter Robb issued GC 20-10 setting forth suggested election protocols while specifically noting that it is not binding on Regional Directors because the Board not the General Counsel has authority over matters of representation. Among other things, the General Counsel proposes, as agreed to by the parties, self-certification that individuals in proximity to the polling place, including observers and party representatives, have not tested positive for COVID-19, or come into contact with someone who tested positive within the preceding 14 days, and are not awaiting test results, along with identifying the number of individuals exhibiting COVID-19 symptoms.

<sup>18</sup> The Board has granted review and issued a stay of directed mail ballot elections in four cases; however, it has not cited factors outside of *San Diego Gas*, established a different standard for analyzing petitions filed during the COVID-19 pandemic, or issued a ruling in those cases that impacts my conclusions and findings herein. See *Airgas USA, LLC*, 16-RC-262896 (unpublished September 24, 2020); *ClarkWestern Dietrich Building Systems, LLC*, 01-RC-264014 (unpublished September 16, 2020); *Draper Valley Farms*, 370 NLRB No. 20 (September 9, 2020); *Aspirus Keweenaw*, 370 NLRB No. 13 (August 25, 2020).

crisis, responsible for upwards of 208,000 deaths in this country.<sup>19</sup> Currently, the number of new COVID-19 cases continues to climb and is surging in several areas of the country. Unfortunately, Wisconsin, with the third-highest rate of new cases in the country only behind Texas and California, is no exception.<sup>20</sup> According to a recent Reuters analysis, new cases of COVID-19 rose in 27 out of 50 U.S. states in September compared with August, led by an increase of 111% in Wisconsin.<sup>21</sup> On October 2 alone there were 2,745 new confirmed cases following a record 2,887 cases on October 1.<sup>22</sup> The 7-day average of confirmed cases in Wisconsin continues to climb dramatically. According to the Wisconsin Department of Health Services, on October 2, the average number of cases confirmed over the last seven days was 2,349.<sup>23</sup> This is an estimated increase of 68 percent from the average two weeks earlier.<sup>24</sup> As of April 17, the date of the Board's Operational Status Update, the average cases over the last seven days was 139. Additionally, on September 30, Wisconsin reported its highest number of COVID-19 hospitalizations on record at 646.<sup>25</sup> As of October 2 there were 663 patients reported as hospitalized with COVID-19, with 181 of them in an intensive care unit, compared to 295 on September 1.<sup>26</sup> Sadly, on October 1, the state set a record with 27 deaths reported followed by

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<sup>19</sup> <https://www.cdc.gov/covid-data-tracker/#cases> (accessed October 5).

<sup>20</sup> *Id.*

<sup>21</sup> <https://www.reuters.com/article/us-health-coronavirus-usa-september-idUSKBN26M5OC>.

<sup>22</sup> <https://www.dhs.wisconsin.gov/covid-19/cases.htm>. (accessed October 5). See also, Coronavirus in the U.S.: Latest Map and Case Counts, *New York Times*. Retrieved from

<https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>, reporting a higher number of 2,820 new confirmed cases on October 2 and 3,004 on October 1 (accessed on October 5).

<sup>23</sup> <https://www.dhs.wisconsin.gov/covid-19/cases.htm#confirmed> (accessed October 2).

<sup>24</sup> <https://www.nytimes.com/interactive/2020/us/wisconsin-coronavirus-cases.html> (accessed October 2).

<sup>25</sup> <https://www.jsonline.com/story/news/local/wisconsin/2020/09/29/wisconsin-coronavirus-surge-cases-continues-17-deaths/3577067001/> (accessed October 5).

<sup>26</sup> <https://www.jsonline.com/story/news/2020/10/02/wisconsin-coronavirus-spike-continues-2-700-new-cases-friday/3591450001/>

21 more deaths on October 2.<sup>27</sup> Undoubtedly, the COVID-19 pandemic has significantly worsened in Wisconsin.

Milwaukee County, where the election is to take place, has not been spared. Although cases in Milwaukee and Milwaukee County are lower than in other parts of the state where cases are climbing dramatically, Milwaukee County continues to see a troubling trend as well. According to Dr. Ben Weston, medical services director for Milwaukee County's Office of Emergency Management, Milwaukee County has been experiencing a trend in COVID-19 cases that is "beginning to reflect the increasing burden of disease of the state more generally."<sup>28</sup> As a result, the county shifted its key indicator for cases from yellow to red<sup>29</sup> after experiencing a significant uptick in the 14-day trend of positive COVID-19 cases.<sup>30</sup> It is not possible for me to know if these numbers represent an increase in the number of infections, a reflection of more widespread testing or better reporting. However, it is sufficient to establish that there is no seen improvement in COVID conditions and that there continues to be spread of COVID, factors which lead me to conclude there is too much risk to holding a manual election at this time or in the near future.

The United States Center for Disease Control and Prevention (CDC) explains that COVID-19 is primarily spread from person to person and that a person may become infected when an "infected person coughs, sneezes or talks" or by "touching a surface or object that has the virus on it, and then by touching your mouth, nose or eyes."<sup>31</sup> The CDC also warns: **"It is important to realize that you can be infected and spread the virus but feel totally well and have no**

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<sup>27</sup> <https://www.dhs.wisconsin.gov/covid-19/deaths.htm#new> (accessed October 2).

<sup>28</sup> <https://www.milwaukeeimag.com/how-does-milwaukee-compare-to-wisconsins-spiking-covid-19-numbers/>.

<sup>29</sup> Per the "Moving Milwaukee Forward Safely" plan, City of Milwaukee updated to red zone by Phase 4.1 Order Update dated September 25. See, <https://city.milwaukee.gov/MMFS> (accessed October 2).

<sup>30</sup> <https://county.milwaukee.gov/EN/COVID-19> (accessed October 2).

<sup>31</sup> <https://www.cdc.gov/dotw/covid-19/index.html> (accessed October 5).

**symptoms**” (emphasis in original).<sup>32</sup> Guidance issued by the CDC recommends limiting in-person visits to stores as well as in-person contact for deliveries whenever possible.<sup>33</sup> This guidance is echoed by the Wisconsin Department of Health Services (DHS) and City of Milwaukee Health Department, both of which recommend limiting in-person contact at this time. The Wisconsin DHS advises residents to “[s]tay at home as much as possible and especially if you are sick. Cancel events and avoid groups, gatherings, play dates, and nonessential appointments.”<sup>34</sup> On September 22, Wisconsin Governor Tony Evers issued Executive Order 90, declaring a new public health emergency, and corresponding Emergency Order 1, extending a face mask mandate into November to fight the surge of coronavirus cases in Wisconsin. Under these orders face coverings are required to be worn for individuals over the age of five whenever indoors with others present, or in an enclosed space, other than a private residence.<sup>35</sup> The City of Milwaukee Health Department advises that COVID-19 “is a respiratory illness that is spreading in the Milwaukee community” and encourages resident to stop the spread by staying home, washing hands and surfaces often, socially distancing from others in public spaces, avoiding group meetings, and wearing face coverings.<sup>36</sup> Although this election would not likely involve significant travel to the facility by a Board Agent and party representatives, nevertheless the CDC continues to maintain that “[b]ecause travel increases your chances of getting infected and spreading COVID-19, **staying home is the best way to protect yourself and others from COVID-19.**” (emphasis in original).<sup>37</sup> At this time, sending a Board agent and party representatives to conduct the election

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<sup>32</sup> “Overview of Testing for SARS-CoV-2 (COVID-19)” (updated September 18, 2020). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html> (accessed October 5).

<sup>33</sup> <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (accessed October 5).

<sup>34</sup> <https://www.dhs.wisconsin.gov/covid-19/protect.htm> (accessed October 2).

<sup>35</sup> <https://evers.wi.gov/Pages/Home.aspx> (accessed October 2).

<sup>36</sup> <https://city.milwaukee.gov/coronavirus#.XpdUA1NKjB> (accessed October 2).

<sup>37</sup> U.S. Center for Disease Control and Prevention, Coronavirus in the United States- Considerations for Travelers available at <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html> (accessed October 5)

would risk the exposure of everyone at the facility. In addition, not all the employees in the petitioned-for unit have returned to work at the museum and remain on furlough; requiring these employees to travel in to vote in-person also heightens the exposure risk. To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: “After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol.”<sup>38</sup> Although it has not directly addressed Board elections, the CDC has issued guidance on elections in general. Its “Considerations for Election Polling Locations and Voters” states that officials should consider alternative voting methods where permitted **“that minimize direct contact and reduce crowd size at polling locations....”**<sup>39</sup>

Manual election procedures inherently require substantial interaction among voters, observers, party representatives and the Board agent, all of whom must be present at the Employer’s facility. The Board Agent, observers and party representatives participate in a pre-election conference in which they must inspect the voting area and check the voter list. The Board Agent and observers must be present in the same space for the duration of the election period. In this regard, although the parties have not proposed specific hours for a manual election,<sup>40</sup> with a unit of over 100 employees, the voting period would likely greatly extend the period of time the Board Agent and observers would spend together. Given the availability of a mail ballot election, ordering a manual election under the current circumstances would be in direct contradiction to the federal, state and local guidance, all of which advise avoiding

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<sup>38</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (accessed October 5).

<sup>39</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (accessed October 5).

<sup>40</sup> The parties only proposed a time frame for an election from October 8 to 24.

in-person contact, which a manual election necessitates. This guidance is even more critical now given the resurgence of COVID-19 statewide.

Furthermore, a mail ballot election avoids the uncertainties created by COVID-19. For example, it is now well-established, although the exact percentage is uncertain, that certain individuals infected with COVID-19 will remain asymptomatic and display no symptoms. It may take several days for a person who has been infected to start displaying symptoms, even though they are contagious prior to display of symptoms. As a result, despite the proposed screening measures, infected individuals could participate in the election, unknowingly exposing co-workers, party representatives, observers, and the Board Agent, who, along with the observers, will be in the voting area for a very long and sustained period of time. A mail ballot election eliminates this risk.

Moreover, if an employee tests positive for COVID-19, suspects they may have COVID-19 due to symptoms, has an elevated temperature, or must be quarantined due to COVID-19 exposure, they will be deprived of their vote in a manual election, as there is no absentee ballot or remote voting options under the Board's manual election rules. A mail ballot election avoids this significant pitfall and ensures all have an opportunity to vote regardless of their exposure to COVID-19 or health status. Furthermore, there is no known date at which the guidance and circumstances I have described above will change. As a result, a mail ballot election in this matter will allow for holding of the election "at the earliest date practicable" consistent with the Board's Rules and Regulations Section 102.67(b).

At the hearing, the Employer proposed holding the election in its large secure area at the museum known as the Northwestern Mutual meeting room.<sup>41</sup> In its brief, the Employer proposed

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<sup>41</sup> I note that the record does not specifically address whether this room is capable of providing social distancing and separate entrance and exit ways.



various safety measures to mitigate COVID-19 as referenced in its “Return To Work Playbook” recently issued to employees returning to work following a multi-month pandemic shutdown. It also agrees to abide by the suggestions made in GC 20-10, entitled “Suggested Manual Election Protocols.” I have carefully considered the Employer’s suggestions and the suggestions in GC Memo 20-10. Ultimately, as GC Memo 20-10 recognizes, the decision to conduct the election by mail ballot is within my discretion. In this case, as I have already described, we have not reached a safe enough juncture in the pandemic. I have determined that the most appropriate course of action at this time is to follow accepted guidance to limit in-person contact and travel within the state.

To support its argument that there is evidence “suggesting a real risk that employees may be disenfranchised by the documented mail service problems in the Milwaukee area,” the Employer specifically points to a July 7 report of the United States Postal Service (USPS), Office of Inspector General (OIG)<sup>42</sup> entitled “Management Alert – Timeliness of Ballot Mail in the Milwaukee Processing & Distribution Center Service Area (Report Number 20-235-R20).” In response to requests from two U.S. Senators and two U.S. Representatives, the OIG investigated reports of absentee ballots not delivered in a timely manner for the April 7 Wisconsin primary election. While concluding that “[t]he Postal Service generally followed its procedures for processing and delivering ballots for the Wisconsin spring election and presidential preference primary of April 7,” the OIG identified “opportunities to improve communication and coordination between the Postal Service and election offices” as well as “potential nationwide issues integrating election offices’ (*sic*) vote by mail processes with the

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<sup>42</sup> According to [usps.oig.gov](https://usps.oig.gov), which I take administrative notice of, the OIG is an arm of the USPS that investigates internal crimes and fraud against the USPS to help deter postal crimes, ultimately helping to maintain a stable and sound Postal Service.

Postal Service processes which could impact future elections.” I note that this report does not comment on general USPS mail delivery procedures, rather, it addresses ballot mail originating specifically from election offices. Even acknowledging the inherent risks and effect of mail delivery procedures on the outcome of a mail ballot election, as noted by the Employer, there is no indication that the USPS is unable to deliver mail.<sup>43</sup> I note that neither party has argued that the petitioned-for employees would be unable to understand the mail balloting procedure. There is no contention that the addresses of the eligible employees are not known or up to date. There is no evidence that the general mail service in Wisconsin, the state in which the mail ballots will be sent and received, has been disrupted. Any mail ballot election, held at any time under any circumstances, includes and ensures procedures by which an employee who has not received a ballot in a timely manner may receive a duplicate. Additionally, the return date for mail ballots could be extended<sup>44</sup> to accommodate voters who may not be regularly residing at their residence or may be quarantining their mail. Mail balloting provides no additional risk to Board Agents, parties, voters, or the public and is consistent with current guidance of limiting in-person contact and travel. Even in the midst of this pandemic, the Region has already successfully conducted a number of mail ballot elections. Although an in-person count may be infeasible, arrangements can be made for a virtual remote count that provides all the safeguards of a traditional count.

For the above reasons, I find that the appropriate and most responsible measure to ensure a safe election is a mail ballot election. A mail ballot election will eliminate the risk of

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<sup>43</sup> While I acknowledge the Employer’s argument that “any determination regarding the form of election must take into account evidence suggesting a real risk that employees may be disenfranchised by the documented mail service problems in the Milwaukee area,” I further note that any party is free to present evidence of any actual disenfranchisement of voters, if applicable, in post-election objections.

<sup>44</sup> In this case, taking into consideration the Presidential election occurring in part by mail, I will extend the normal two-week period to return mail ballots to three weeks.

unnecessarily exposing employees, Board agents, party representatives, and their families to COVID-19, and it will ensure that the Unit employees have the opportunity to vote promptly.

### **CONCLUSION**

For the reasons stated above, I have concluded that there is no basis on which to find a bar to Petitioner's representation of the petitioned-for employees at issue in this case. I further conclude that under the extraordinary circumstances described above, the election will be held by mail ballot.

Based on the foregoing, I conclude that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

**Included:** All full-time and regular part-time professional and non-professional employees employed by the Employer at its Milwaukee, Wisconsin facilities.

**Excluded:** All other employees, office clerical employees, temporary employees, confidential employees, guards and supervisors as defined by the Act, as amended.

### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a mail ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by DISTRICT LODGE 10, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO.

Since some of employees are professional employees within the meaning of Section 2(12) of the Act<sup>45</sup> and some are non-professional,<sup>46</sup> they should vote in a self-determination election, pursuant to *Sonotone Corp.*, 90 NLRB 1236 (1950). In order to ascertain the desires of the professional employees as to their inclusion in the unit with the non-professional employees, I shall direct separate elections in the following groups:

**VOTING GROUP - UNIT A (PROFESSIONAL UNIT):**

**Included:** All full-time and regular part-time professional employees employed by the Employer at its Milwaukee, Wisconsin facilities.

**Excluded:** All other employees, non-professional employees, office clerical employees, temporary employees, confidential employees, guards and supervisors as defined by the Act, as amended.

**VOTING GROUP - UNIT B (NON-PROFESSIONAL UNIT):**

**Included:** All full-time and regular part-time non-professional employees employed by the Employer at its Milwaukee, Wisconsin facilities.

**Excluded:** All other employees, professional employees, office clerical employees, temporary employees, confidential employees, guards and supervisors as defined by the Act, as amended.

The employees in Unit A will be asked two questions on their ballots:

- (1) Do you wish to be included in a unit with non-professional employees for purposes of collective bargaining?

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<sup>45</sup> As noted, the parties stipulated there are 45 professional job classifications in the unit: Associate Registrars for Exhibitions & Loans; Associate Content Writers; Kohl's Color Wheels Team Coordinators; Assistant Facility Engineers; Media Archivists; Volunteer Coordinators; Collection Managers of Works on Paper; Support Technicians; Youth & Family Programs Coordinators; Public Relations Managers; Audio Visual Technicians; Curatorial Department Administrators; Production Designers; Finance Directors; Development Officer for Memberships; Sales & Events Managers; Systems Administrators; Art Preparators; Associate Registrar/Database Administrators; Youth & Family Programs Educators; Food & Beverage Supervisors – Restaurant; Web Developers; Design & Brand Leads; Framer/Mountmakers; Partnership & Audience Activation Events Managers; Lead Preparators; HVAC Technicians; Family Programs Teachers; Assistant Conservators; Associate Registrars; Associate Curators of Prints & Drawings; Associate Educators for School & Teacher Programs; Sr. Development Officers for Institutional Giving; Assistant Curators of Photography; Kitchen Managers – Catering; Special Events Lead Cooks; Event Project Managers/Directors of LFOA; Kohl's Art Generation Community Relations Coordinators; Accountants; Chief Designers; Assistant Curators of European Art; Kohl's Color Wheels Art Teachers; Strategic Projects & Operations Managers; Design & Photography Leads; Associate Conservators.

<sup>46</sup> The specific classifications of the non-professional employees were not provided.

- (2) Do you wish to be represented for the purposes of collective bargaining by District Lodge 10, International Association of Machinists & Aerospace Workers, AFL-CIO?

If a majority of the professional employees in Unit A vote “yes” to the first question, indicating their wish to be included in the unit with non-professional employees (Unit B), they will be so included. Their votes on the second question will then be counted together with the votes of the non-professional employees to determine whether or not the employees in the combined professional and non-professional unit wish to be represented by District Lodge 10, International Association of Machinists & Aerospace Workers, AFL-CIO. If, on the other hand, a majority of the professional employees in Unit A vote against such inclusion, they will not be included with the non-professional employees. Their votes on the second question will then be separately counted to determine whether or not they wish to be represented by District Lodge 10, International Association of Machinists & Aerospace Workers, AFL-CIO.

The non-professional employees comprising Unit B will be polled to determine whether or not they wish to be represented by District Lodge 10, International Association of Machinists & Aerospace Workers, AFL-CIO.

The unit determination is based, in part, on the results of the election among the professional employees. However, the following findings in regard to the appropriate unit are now made:

- (1) If a majority of the professional employees vote for inclusion in the unit with the non-professional employees, I find that the following will constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

**Included:** All full-time and regular part-time professional and non-professional employees employed by the Employer at its Milwaukee, Wisconsin facilities.

**Excluded:** All other employees, office clerical employees, temporary employees, confidential employees, guards and supervisors as defined by the Act, as amended.

(2) If a majority of the professional employees do not vote for inclusion in the unit with the non-professional employees, but do vote for representation apart from them, I find that the following two groups of employees will constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

**Included:** All full-time and regular part-time professional employees employed by the Employer at its Milwaukee, Wisconsin facilities.

**Excluded:** All other employees, non-professional employees, office clerical employees, temporary employees, confidential employees, guards and supervisors as defined by the Act, as amended.

**Included:** All full-time and regular part-time non-professional employees employed by the Employer at its Milwaukee, Wisconsin facilities.

**Excluded:** All other employees, professional employees, office clerical employees, temporary employees, confidential employees, guards and supervisors as defined by the Act, as amended.

### ELECTION DETAILS

I have determined that the election will be conducted through mail ballot. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Milwaukee Sub-Regional office, on October 19, 2020, at 4:30 p.m. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Milwaukee Sub-Regional office by close of business at 4:30 p.m. on November 9, 2020. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void. The mail ballots will be counted at the Milwaukee Sub-Regional office located at 310 W. Wisconsin Avenue, Suite 450W, at 1:00 p.m. on November 13, 2020.

To help avoid the untimely return of a ballot, any person who has not received a ballot by October 26, 2020, or otherwise requires a duplicate mail ballot kit, should contact the Milwaukee Sub-Regional office in order to arrange for another mail ballot kit to be sent to that employee.

To ensure the safety of the Board Agent and the public, the count shall be conducted virtually. Additional instructions will follow.

### **VOTING ELIGIBILITY**

Eligible to vote are those in the unit who were employed during the bi-weekly payroll period ending September 26, 2020, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### **VOTER LIST**

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names,

work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellphone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **October 8, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word (.doc or .docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not



object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

### **POSTING OF NOTICES OF ELECTION**

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election that will issue following this Decision in conspicuous places<sup>47</sup>, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

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<sup>47</sup> Given the need for Spanish translation, the Notices of Election are being issued separate from this Decision.

### **RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site ([www.nlrb.gov](http://www.nlrb.gov)), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlrb.gov](http://www.nlrb.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Although neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board, all ballots will be impounded where a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision, if the Board has not already ruled on the request and therefore the issue under review remains unresolved. Nonetheless, parties

retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated October 6, 2020.

/s/ Jennifer A. Hadsall

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